ENGLISH CASE

U. VISWALINGAM v. S. VISWALINGAM

[C.A. (Roskill, Ormrod L.JJ. and Cairns J.) July 24, 1979]
[London — Civil Case No. 15785 of 1977]

Family Law — Marriage in Colombo — Husband then a Hindu and the wife a Christian — Marriage under Marriage Registration Ordinance, Ceylon — Parties becoming domiciled in Malaysia — Husband becoming Muslim — Whether marriage automatically put to an end — Wife resident in England and resumed her domicile of origin — Meaning of "Kitabiyyah" — Fatwa by Mufti, Wilayah Persekutuan — Whether Courts in England bound to accept that marriage had come to an end — Discretion to decline recognition — Discretion exercised in favour of wife — Recognition of Divorce and Legal Separation Act, 1971, ss. 6 & 8.

In this case the appellant, who was originally a Hindu Ceylon Tamil married the respondent, who was a Christian of the Anglican faith, in Sri Lanka under the Marriage Registration Ordinance of Ceylon in 1955. Subsequently the parties came to Malaysia, where they acquired Malaysian citizenship. There were problems between the parties and in 1973 the wife and one of the children went to England. The parties decided that the children were to be educated in England and the appellant bought a house in Edgeware, London. The house was conveyed to the joint names of the husband and the wife. In 1976 the appellant embraced the Muslim faith and subsequently married a second wife. The wife in the meantime had become resident in England and as found by the learned judge had resumed her domicile of origin in Sri Lanka. In 1977 the wife filed her petition seeking a decree of dissolution of marriage from her husband the appellant, on the grounds of his unreasonable behaviour. It was alleged on behalf of the husband that the marriage had already ceased to exist because he had embraced the Muslim faith. At the trial a *fatwa* from the *Mufti* of the Federal Territory of Kuala Lumpur was accepted which stated that the marriage had ceased to subsist by reason of the husband's conversion to Islam and the failure of the wife to follow suit. The learned trial judge held that although by Malaysian Law the marriage had ceased to exist on the date of the husband's conversion to Islam, the court in England was not bound to recognise the happenings in Malaysia as having already put an end to the marriage and, in the exercise of its residual discretion, the court should grant a decree of divorce on the ground of the husband's unreasonable behaviour and make an award of a lump sum to the wife. The appellant appealed.

Held: (1) for the purposes of the appeal it will be accepted that under the Malaysian law the learned judge was right in holding that the marriage had automatically come to an end on the husband's conversion to Islam;

(2) the change in status could not be recognised under the Recognition of Divorces and Legal Separations Act, 1971, as the way in which the marriage came to an end could not be categorised as a divorce or legal separation within the meaning of the Act and there was no form of proceedings as contemplated by sections 6 and 8 of the Act;

(3) the alleged change of status was contrary to the court's concept of substantial justice and therefore the court was not prepared to recognise that the wife in this case had ceased to be the wife of the husband at the date when she presented her petition to the court.

Cases referred to:-

(1) *Attorney-General Ceylon* v. *Reid* [1965] A.C. 720; [1965] 2 M.L.J. 34.
(2) *Gray (Orse, Formosa)* v. *Formosa* [1963] P. 259.
(3) *Salvesen or Von Lorang* v. *Administrator of Austrian* Property [1927] A.C. 641.
(4) *Lepre* v. *Lepre* [1965] P. 52 at p. 65.

HIGH COURT.

G. Flather for the petitioner.

S.S. Stevens for the respondent.

Cur. Adv. Vult.

Wood J.: In this suit the petitioner, to whom I shall refer as the wife, seeks a decree of dissolution of the marriage from the respondent (the husband) upon the grounds of his unreasonable behaviour. As I shall explain later, her case was not seriously challenged, but the husband alleges that the marriage has already ceased to subsist, because on August 13, 1976, and without his wife's knowledge, he embraced the Muslim faith; alternatively, he relies upon the existence of a *Fatwa,* or ruling, in a letter from the Mufti of the Federal Territory of Kuala Lumpur dated March 6, 1978, whereby the Mufti confirmed to the husband's legal advisers that pursuant to Muslim substantive law the marriage no longer subsisted. As I have also heard evidence on the ancillary financial claims, I propose to deal with all issues before me in this one judgment and in open court.

This matter was originally due to be heard on December 12, 1978 but an application for the date to be vacated was made to me on December 6, 1978, on behalf of the husband. A number of medical reports were placed before me, and I was told that on September 15, 1978, the husband had started proceedings before the Malaysian courts for a declaration that this marriage had ceased to subsist on August 13, 1976.

During September 1978, the husband had been admitted to St. Bartholomew's Hospital in London where the senior consultant neurological surgeon had carried out an exploratory operation of his right kidney through a lumbotomy incision. The calculus was found exposed and extracted. He was discharged on September 28, 1978, and, as advised, returned to Kuala Lumpur through the United States of America and Honolulu, in order to convalesce. On return to Kuala Lumpur he had suffered some pains over the lower end of the operation wound and also in the left side of the abdomen. It occurred to me from a reading of the various reports that it would be likely that the husband would be fit for travel by mid-February 1979, and therefore a date was fixed for this hearing to start on Monday, February 12, 1979. Unfortunately, the husband could only manage to travel as far as Colombo in Sri Lanka, which he reached on or about February 9 or 10, en route for London. Since that time, and throughout the ten days on which this case has been before me, the husband has been unable to travel further. He is suffering from pain and discomfort and a purulent discharge from the site of the operation.

My task has therefore been rendered more difficult as the husband has been deprived of the opportunity of giving evidence before me. However, I was informed by his counsel that he was most anxious that the hearing should continue and that there was to be no application for a further adjournment. His Telex read, "Please request judge to excuse my absence and carry on case with available evidence."

On January 26, 1979, and no doubt with the possibility in his mind that he might not reach London, the husband swore an affidavit in Kuala Lumpur setting out his present financial situation. This, together with two very short affidavits, was the only evidence for the husband, apart from his expert witness.

A great deal of the wife's evidence remained unchallenged and the evidence of unreasonable behaviour was overwhelming. However, in the light of the problems raised by the Answer, I must examine the whole history of this marriage in some detail.

The husband is now 51 and gives his address as 90, Jalan Imbi, Kuala Lumpur, Malaysia. He was born in Malaysia, but his family come from Ceylon, now Sri Lanka. Until his conversion to Islam, he was a Hindu by religion. His father was an ophthalmic surgeon.

The wife is now 52. She was born in Ceylon and her family still live there, as do some of her brothers and sisters. She always has been a Christian of the Anglican faith and confirmed into the Anglican Church. Her father was a lawyer.

From about 1948, when he was 18 or 19, the husband was educated in England. He attended some educational establishment in London from that date in order to obtain his entrance to a university in this country. He eventually succeeded in obtaining a place at Bristol University where he read medicine. In 1954 he returned to Ceylon during a vacation from the university and there he met his wife-to-be. At that time she was teaching at the same school as the husband's sister. The husband had not been very successful in his various examinations at Bristol, and when he asked his father for permission to marry a Christian this proved to be the culminating point in an unhappy relationship with his father. As a result, the husband was cut off by his father without funds.

On March 30, 1955, husband and wife were married in Colombo under the provisions of the Marriage Registration Ordinance of Ceylon. The wife's father gave her a sum of Rs. 56,000 (then worth £4,200) on her marriage, which sum was placed in a bank in Colombo.

Husband and wife then travelled to Bristol, where they lived in a flat, and the husband continued his medical studies. The wife herself entered Bristol University to read English and Philosophy, but was only able to complete about one year's work due to the arrival of their first child. Thereafter, she looked after their children. The husband completed his post graduate medical training in Bristol, and ultimately, in 1960, the family returned to Ceylon. From about 1959 onwards, the husband received some small income in England, but apart from this, the wife, through the money given to her by her father, was the sole provider for the family. Without this support, the husband would have been unable to complete his medical studies. During their time at Bristol, they had two holidays costing about £250 in total, and the wife had spent some £150 on her own fees at the university. Apart from these sums, the remainder of the wife's money was spent on family subsistence.

There are three children of the family as follows: Nambi, born April 9, 1957; Ajit, born October 31, 1959, and Pria, born August 1, 1962. The first two were born in Bristol and are therefore of British nationality.

When the family moved to Ceylon they lived with the wife's parents free of rent. The husband found that he could not settle there and in 1961 they all moved to Kota Bahru in the northern part of Malaysia. The husband was in government service at that time, earning a monthly salary of M$1500. A government house and furnishings were provided, and they had an indoor servant and a gardener. They also bought a car.

In 1965 the family moved to Klang near Kuala Lumpur, where the husband started private practice. He was earning about M$2,500 per month. After the arrival of Pria in August 1962, the family staff was increased by the addition of a girl who helped look after the children.

In 1966 the family moved to Kuala Lumpur where the husband opened a private clinic. He was an obstetrician and gynaecologist. On October 31, 1969, the marriage was registered under the Registration of Marriages Ordinances, 1952. This took place as one step in the process of obtaining Malaysian citizenship. Both husband and wife became citizens of Malaysia. It was in about 1970 that a house was bought in an expensive residential part of Kuala Lumpur. This house was extensively altered with the assistance of an architect, and it was the wife who was responsible for all the detailed furnishings and equipping of this their first home which they owned themselves. The total cost was some M$160,000. There were two indoor servants, a gardener and a driver, and the family had three expensive cars. The wife estimated that during this period in Kuala Lumpur the husband was earning about $7,500 a month at the clinic. The family led a very social life, entertaining and being entertained in a substantial way. Neither wife nor children lacked for anything.

For a short while the wife took part-time employment with Radio Malaysia, but this ceased when the husband objected to her working.

The husband was always hot tempered and "if thwarted could go berserk". This was the expression used by the wife. As the evidence subsequently indicated, he was domineering and over-bearing of nature. There had, however, been no violence until approximately 1969, when the husband was cited as a co-respondent in a divorce suit between a Mr. and Mrs. Lobo. This association had been going on for some time and the wife had tried to ignore it. The husband was in fact dismissed from the suit, but even during the hearing of the case he went away with Mrs. Lobo for a weekend. The wife taxed him about this and he asked her how she knew. She did not wish to give away a friend and said that she had received a "telephone call". The husband checked on this and the following day faced her with the fact that there had been no telephone call. She was literally beaten up by her husband in front of the children and the servants, who themselves tried to intervene. When the wife tried to send the children to bed the husband said "No", he would wish them to see what happened to their mother. He seized her by the throat and slapped her violently. He wrenched the telephone out of its socket. The wife left home.

She was driven back next day, but was imprisoned in her own home for about six months with no

MLJ 2005

money. The driver was forbidden to obey her orders; she was also forbidden the use of the telephone. The husband was drinking heavily at this time and she awaited his return each evening in terror. If he was calm she remained in her room, but if he was drunk and liable to be violent she went into the garden. She spent several nights thus in the garden.

There were other occasions, which were not told to me in detail, when her husband had thrown glasses at her. On one such occasion her lip was lacerated and on another she received a black eye where the glass hit her.

During 1971 the husband continued to see Mrs. Lobo and take the children to her house for weekends. The wife eventually could stand this no longer, drove to the clinic and spoke to her husband about it. In the clinic itself, and in the presence of patients and staff, the husband attacked her and beat her, cutting her lip. He seized her bag and told her to get out. She had no money and eventually arrived home, packed her bags and went to a hostel. For a very considerable period of time, the husband continued to be totally infatuated by Mrs. Lobo and spent as much time with her as he could. During 1972 the wife asked to be allowed to live separately but her husband refused. In December 1973, the relationship between the husband and Mrs. Lobo came to an end. The house which they had purchased together was sold, and half the proceeds were returned to the husband. Mrs. Lobo, a Roman Catholic, married an Englishman and thereafter she forms no part of the history of this family.

The language used in the family has always been English. The three boys were at school in Kuala Lumpur, where the basis of education was very similar to that in England, but there came a time when the husband became worried that English was no longer to be the language in which the boys were taught. There was also likely to be a variation in the school curriculum, and he was worried about the political stability of Malaysia in the light of the presence of a fanatic Islamic element. Added to these worries was the difficulty, which was going to occur, in obtaining places for the boys at university in Malaysia. This was due to the existence of national quotas whereby particular nationalities were only allowed a percentage of available places. The position of the three boys was that they would be competing for only 1% of available vacancies.

As a result of these problems, the wife and Nambi were sent to England immediately after Christmas, 1973, where she was to arrange for Nambi to continue his education. She remained here until March 1974, when she returned to Kuala Lumpur. Whilst she had been in England, her husband had taken an interest in a discotheque, and on her return the wife introduced him to a model, Indra Sivam, whom she thought would be able to assist him in connection with his discotheque and its decoration. It was not long before Indra Sivam became his second mistress. She is now his second wife.

Having decided that the boys were to be educated in England, the husband on December 16, 1974, bought a house at 23, Rectory Gardens, Edgeware. It had four bedrooms and was an entirely suitable home for his wife and children. On June 10, 1975, the house was conveyed into the joint names of husband and wife. I am satisfied that there were at least two reasons for this. One of them was to support an application by the wife to the Home Office for leave to remain in the United Kingdom, and another was that the house being in joint names would provide a base and some security for the wife and the boys should anything untoward occur to the husband.

During August 1975, the wife arrived in England, and thereafter she and the three boys made their home at 23, Rectory Gardens.

On a date which is not entirely clear to me, and without consulting his wife, the husband sold the matrimonial home in Kuala Lumpur for M$400,000, which is approximately £94,000. All the wife's belongings were packed up, including cutlery, china and other household objects, and were sent over to London. The crates arrived in about February or March 1976. The husband came over for a week at Christmas, 1975, and stayed at Edgeware, but that was the last occasion on which husband and wife lived together.

When the wife arrived in London there lived at the home at Edgeware a Mr. Rajadurai Vigneswaran. He was a nephew of the husband, aged about 32, an accounts clerk, and he was living there as some work was being carried out at this home. Despite her objections, the husband insisted on his nephew continuing to live at the matrimonial home. He spied on the wife throughout. Her visitors, her expenditure, everything was reported almost daily in the minutest detail to the husband in Kuala Lumpur. Wives are sometimes called upon to keep rough household accounts, but this wife was ordered to account for every penny. I do not need to elaborate by reference to documentation, but the wife's existence must have been a total misery. She was hectored and bullied at every stage by her husband.

During August 1976, the husband, through his nephew, sold the car which the wife had been using for herself and the boys without asking her or referring to her in any way. This attitude and behaviour by her husband continued until ultimately the wife left home on January 9, 1977, and went to live with her nephew, and ultimately with her sister, at her present address 6, Brambletie Park Road, Earlswood, Surrey.

On August 13, 1976, the husband embraced the Muslim faith by making a simple declaration before witnesses. This he did without informing his wife.

On September 2, 1976, the wife signed a Deed of Gift together with her husband, whereby the home in Edgeware was given to the nephew. She received no independent advice about this matter, and she was persuaded to sign because the husband had apparently been visited by the Inland Revenue authorities in Malaysia and was anxious that he should have no interest in the house which may have been purchased with what is termed "black money" — that is monies which had not been declared for tax. The wife's sister gave evidence before me stating that the wife

was terrified of her husband and would do anything if he snapped his fingers. In view of his intolerable behaviour towards her, I accept this description of the situation and I am not surprised that the wife was prepared to do whatever was required of her. The house was conveyed into the nephew's name on December 3, 1976.

It is now convenient for me to deal with the education of each of the boys after he arrived in England. In December 1973, Nambi went to Aldenham School, where he remained until he went to Trinity College, Dublin, in 1977. He was only there one term and was taken away by his father from Trinity College in February 1978, and sent to Australia. The wife does not know precisely where he is, but understands that he is being educated in Australia free of charge under the state system. He writes to his mother about once a month.

Pria also went to Aldenham, but was taken away in mid-term during February 1977, by his father and sent to Singapore. This was also done without reference to the wife. She understands that Pria has now moved to Australia. His mother hears from him occasionally, and he seems to be more settled than he was initially.

Ajit at first attended a teaching establishment in London, but found the intensive instruction difficult. He did not do very well, but his performance improved substantially when he moved to Divine Mercy College at Henley. He has remained there, although the husband has refused to pay any fees since February 1977. His mother has paid for his fees by borrowing from her relations in London, and the present situation is that Ajit is taking his 'A' level exams in June, and, subject to satisfactory grades, he has been offered a place at Liverpool, Swansea and Bangor Universities to read marine biology and oceanography. He has no contact with his father and has been cut off so far as funds are concerned.

I have seen some of the letters written by this father to his sons. I am not dealing with issues of custody or care and control and therefore my only purpose in reading them is to ascertain the relationship between father and sons and the likelihood of his maintaining them properly in the future until they are able to earn for themselves. I do not intend to refer to any letter in detail, but I am extremely worried about Ajit's future, and I shall proceed on the basis that it is unlikely that his father will make provision for him. As to Nambi and Pria, I have no evidence to suggest that he has not been maintaining them, and I shall assume that he will continue to do so.

On March 21, 1977, the wife started proceedings in the Queen's Bench Division for an order setting aside the conveyance to the nephew on the grounds of undue influence. The defence was not served until May 15, 1978. This action has been transferred from the Queen's Bench Division and is listed to be heard immediately after the present matter before me.

On September 11, 1977, the husband married for a second time. In October 1977, the boys were late back from Kuala Lumpur for their schools, and on this occasion they told their mother about their father's second marriage and about his conversion to Islam. This news took their mother completely by surprise.

On November 10, 1977, the wife filed her present petition, relying for jurisdiction on the provisions of section 5(2)(a) of the Divorce and Matrimonial Proceedings Act, 1973, (one year's habitual residence). On March 6, 1978, the Mufti issued the *Fatwa*. Eight days after the defence in the Queen's Bench action, namely on May 23, 1978, the Answer in this suit was filed.

By November 1977, the wife had found herself in the position where she really had lost everything, save possibly an interest in the proceeds of the sale of the house at Edgeware. She and her husband had started from very small beginnings. She had put into the marriage all the finance available to her, she had given birth to three sons and had looked after them and the home as best she could. No criticism is made of her. She had supported her husband through the lean years and had supported him when times were more affluent. The one real home which they had had in Kuala Lumpur and which she had helped to build was sold without reference to her, and all her belongings were packed up and sent to follow her to England. Thus by 1976 there was no matrimonial home in Malaysia, and the only possible matrimonial home as such was at Edgeware, where she and the three boys had made their new base. The husband visited them from time to time from Kuala Lumpur. The husband by his conduct had made it impossible for her to continue to live there; she had conveyed her part of that home to the husband's nephew at his behest, and now she was living with her sister. The maintenance provided for her was stopped when she issued the proceedings for divorce. Until she discovered the respondent's change of religion and second marriage in October 1977, I believe she always thought that she would return to Kuala Lumpur after the boys' education had been completed. Her intentions changed radically in October 1977, when she realised, as she told me, that she could never return to Kuala Lumpur. This is readily understandable and I accept her evidence. Her visa to stay in the United Kingdom has only been extended until the end of this case, and thereafter she must leave. She has told me that she would like to be able to settle down wherever her children are, and she had thought of moving to Australia if she could obtain permission to enter. The likelihood is that she will have one son completing his education in England and the other two at establishments in Australia of which she has no details. The only place to which she can go, whether on a temporary basis or a more permanent basis, is Sri Lanka, there to stay with her mother until she can plan her future with some degree of certainty. I have seen a document from the immigration authorities in Sri Lanka giving her permission to enter and also explaining that she might be able to apply for citizenship. In my judgment, the wife retained her domicile of choice in Malaysia until October 1977, but at that time she abandoned that domicile of choice. She has not adopted any other domicile by choice since that time, and therefore her domicile of origin revives, and I hold that she is at present domiciled in

Sri Lanka. She is a citizen of Malaysia. She is habitually resident in England. The husband is domiciled and habitually resident in, and a citizen of, Malaysia.

Expert Witnesses

I am most grateful to Doctor Pearl and Doctor Yaacob for their help in explaining to me the law of Malaysia as it affects the issues before me. Each of them is a member of the English Bar and, as one would expect, gave his evidence without regard to the party by whom he was called. Doctor Pearl is an acknowledged expert in Muslim law, who has spent some four months lecturing at a university in Singapore, but who has spent the major part of his time abroad in India and Pakistan. In those countries it is the Hanafi School of Muslim Law which applies, whereas in Malaysia it is the Shafii School. Doctor Yaacob is a practising lawyer from Kuala Lumpur whose standing in the profession in Malaysia is of the very highest. He is also a devout Muslim who has studied the Koran from his early youth. I formed the view that Doctor Yaacob had the greater opportunity of being able to tell me the practical effect in Malaysian law of the act of conversion and of the *Fatwa*.

Malaysian Law

There are four main sources of law in Malaysia; Statute, the Common Law, Muslim Substantive Law, and Custom. It is only with the first and third that I am concerned.

By Article 3 of the Federal Constitution, Islam is declared to be the religion of the Malaysian Federation. By Articles 73 and 74 certain laws may be passed by the Federal Parliament and others by State Parliaments. The statutes governing the administration of Muslim law are passed by the State Parliament, which for my present purposes is the State of Selangor. By the Selangor Enactment No. 4 of 1973, the Federal Territory (i.e. Kuala Lumpur) ceased to form part of the State of Selangor, but the state laws then existing and in force continued to be effective. Thus I turn to the Administration of Muslim Law Enactment, 1952. This enactment sets up a Majlis or Council of Religion and Malay Custom for Selangor. It also provides for the appointment of a Mufti who is a member of the Majlis, but whose main function would seem to be as chairman of the Legal Committee of the Majlis.

From the provisions of section 41 it is clear that any person and any court, other than a religious court, may request the Majlis for a *Fatwa* or ruling upon any point of Muslim law. Such request, unless frivolous, is answered by the Mufti as chairman of the Legal Committee. The request to the Majlis is often referred to as a request to the Mufti. In issuing his ruling, the Mufti must ordinarily follow the orthodox tenets of the Shafeite sect or school: see section 42(1).

It is important to remember that, for a Muslim, law and religion are intertwined. There are four traditional sources of Islamic law. The basic and original source is the Koran, which must be studied in its original text. No translation is truly authoritative. The Muslim jurists in different communities may interpret the true meaning differently. Doctor Yaacob gave me as an example the Turkish interpretation of the so-called "polygamous verse" which requires a Muslim marriage in Turkey to be monogamous, whereas polygamy is practised in most other Muslim communities. Secondly, there is Sunnah — being the traditions of Mohammed which his companions wrote down and the jurists interpret. Thirdly, there is Ijma or consensus of opinion; and the fourth is Qiyas or analytical deduction.

In Malaysia the Muftis are the jurists, and on receipt of a letter requesting a ruling the Mufti will carry out his own investigations and issue his *Fatwa*. He can, if he sees fit, make further enquiries on the facts, but there is no question of arguments or submissions as in a court of law. It would follow from what is set out above, and indeed as I was told, that the views of the Mufti in different states may vary the one from the other. Doctor Yaacob told me that a *Fatwa* could be issued in connection with many varying aspects of Muslim law — for example, in connection with inheritance and the administration of an estate. He also said that each *Fatwa* has the effect of law on the issue which is decided.

This was not accepted by Doctor Pearl, who took the view that a *Fatwa* was ineffective unless published by notification in the *Gazette*. He relied upon the provisions of section 42(3) of the Administration of Muslim Law Enactment, which reads:

"(3) Any ruling given by the Majlis, whether directly or through the Legal Committee, or any determination of any question by His Highness the Sultan in accordance with the foregoing provisions shall, if the Majlis so determine or if His Highness the Sultan so directs, be published by notification in the *Gazette* and shall thereupon be binding on all Muslims resident in the State."

The rules for the construction of statutes and documents in the Malaysian courts are the same as in England, and in my judgment the effect of this subsection is that a *Fatwa* is binding between the immediate parties to the issue, even if not gazetted, but if the *Fatwa* is of wide implication and it is desired to give it the effect of law within the community, then if it is gazetted in accordance with the provisions of section 42(3) it will have that effect.

By substantive Muslim Law, a Muslim woman can only marry a Muslim man. A Muslim man, however, can marry a Muslim woman and also a Kitabiyya (I have taken all spellings from Doctor Ahmad Ibrahim's book, "Islamic Law in Malaya", which is the only published work on the subject). A loose definition of Kitabiyya would be a Jewess or Christian. If she was not a Kitabiyya, then the marriage would be irregular and would not be valid.

If a married man embraces Islam, the effect upon his existing marriage will depend upon whether his wife (unless she becomes a Muslim) is a Kitabiyya or not. If she is not, then unless she also turns to Islam within three months of her husband's conversion, the marriage ceases to subsist and the date of such cessation reverts to the date of his conversion. During this period of three months the Shafii School does

not require the husband to offer the Muslim religion to his wife.

A simple declaration of faith in Islam and the saying of a prayer aloud before a witness constitutes conversion. No certificate of any kind is necessary by the substantive Islamic Law, although as a matter of administration there is a register of converts maintained in the State of Selangor.

The effect of conversion cannot be compared with the English notion of nullity because the marriage until cessation is perfectly valid and has no flaw in it.

Some time early in 1978, Doctor Yaacob was instructed by the husband's lawyers in Kuala Lumpur to advise on Muslim law. On January 27, 1978, he wrote to the Mufti, and on March 6, 1978, the Mufti replied. The two documents read as follows:

"27th February, 1978.

The Mufti of the Federal Territory,
Kuala Lumpur.

Sir,

We act for Dr. Umar Viswalingam bin Abdullah, formerly known as Dr. Uma Viswalingam.

Our Client, then a Hindu, underwent a civil marriage on March 30, 1955, in Sri Lanka (Ceylon) with one Sarojini d/o Sevaprakasam, an Anglican, i.e. a follower of a Christian denomination which came into existence after the birth of Prophet Mohammed.

Our Client's wife has been living in England since 1974 and has remained an Anglican.

We have been instructed to obtain a fatwa in respect of the aforesaid marriage, particularly in regard to the fact that our Client's wife is still an Anglican.

Thank you.

Yours faithfully,
DR. YAACOB."

Then the reply:

"Our ref: Bil. (30) dlm.MUI/F 025.

Your ref: 1000-8.

Prime Minister's Department,
(Religious Section),
Islamic Centre,
Jalan Lembah,
Kuala Lumpur.
26 R. Awwal 1398
= 6 March, 1978.

Dr. Yaacob & Ismail,
4028B, 4th Floor,
President House (Regent Hotel),
Julan Sultan Ismail,
KUALA LUMPUR.

Sir,

Re: *Marriage of Dr. Umar Viswalingam bin Abdullah and Sarojini d/o Sevaprakasam*

With reference to your letter dated 27th February 1978 in respect of the above, this is to inform you that pursuant to Muslim Law in force in the Federal Territory, the marriage in question no longer subsists since Dr. Umar has embraced Islam and his wife has not followed suit.

2. This ruling/Fatwa is made in accordance with the facts referred to in your letter aforesaid.

Yours faithfully,
Sgd.
(DATUK SHEIKH A. MOHSEIN B.H. SALLEH)
Mufti of the Federal Territory."

With the *Fatwa* was enclosed a copy of some previous ruling in another matter which the Mufti no doubt included so that Doctor Yaacob could understand the reasoning behind the *Fatwa* of March 6, 1978. It formed no part of this particular *Fatwa*. That document read as follows:

"The Question of non-Muslim Husband and Wife in the circumstances wherein one of them embraces Islam, and the Question of a non-Muslim woman who, having embraced Christianity, marries a Muslim.

The Secretary intimated that the decision of the 13th Fatwa Committee Meeting in respect of the above matter will be conveyed to the National Council for Islamic Religious Affairs, Malaysia, on the 13th day of August, 1977.

The Council unanimously agreed to amend decision (3) of the 13th Meeting to read as follows:

(3) A Kitabiah is a Jewess or female Christian who:

(i) Is a descendent of Prophet Jacob if her ancestors are not known to have embraced the religion (Judaism or Christianity) after it was annulled (i.e. superseded by a subsequent religion such as Judaism being annulled by Christianity and Christianity being annulled by Islam) or

(ii) Being a non-descendent of Prophet Jacob, if her ancestors are known to have embraced the said religion before it was annulled by a subsequent religion.

Ruling: It is lawful to marry the above defined Kitabiah. It is unlawful to marry a Jewess or Christian who is not a Kitabiah.

In order to avoid any misconception, the Council also decided to give wide publicity to the above ruling.

Sgd.
(DATUK SHEIKH A. MOHSEIN B.H. SALLEH)."

Doctor Pearl did not agree with this definition of a Kitabiyya, but I take the view that a Malaysian court would accept the ruling as given by the Mufti, and I so find.

Thus, by Malaysian law, this marriage ceased to subsist on August 13, 1976. This cessation was brought about by the husband's conversion to Islam, together with the passing of three months thereafter.

The children remain legitimate and are entitled to some share of the inheritance.

The fact that the present marriage (a foreign marriage in Malaysia) was registered under section 5 of the Registration of Marriages Ordinance (a federal statute) does not alter the effect of the conversion.

It was, however, made clear by Doctor Yaacob that if this marriage had been solemnised within Malaysia under the Civil Marriage Ordinance, 1952, it could only have been dissolved, in accordance with the provisions of that Ordinance, by the death of one of the parties, by order of a court of competent jurisdiction, or by a declaration of nullity. Both Doctor Yaacob and Doctor Pearl agreed that the Malaysian Federal Ordinance was substantially in the same terms as the Ceylon Ordinance referred to in *Attorney-General of Ceylon* v. *Reid*.[1] It was also common ground between the experts that by the law of Sri Lanka, this husband's conversion to Islam would not have affected the validity or existence of this marriage.

Finally, Doctor Yaacob told me that by Malaysian law the Ceylon Rs. 56,000 given to this wife by her father, together with an allowance for inflation, would be repayable subject to the deduction of such part as was spent for her benefit alone; and that

although the wife would not be entitled to any periodical payments after three months (that is the Iddah), she could receive a gift or lump sum in the assessment of which many of the features mentioned in section 25 of the Matrimonial Causes Act, 1973, would be taken into account. For the future, she would have to learn to live on that money.

English Law

It is submitted on behalf of the husband that under the provisions of the Recognition of Divorces and Legal Separations Act, 1971, (the 1971 Act), this court is bound to recognise the dissolution of this marriage according to Malaysian law either by the conversion or the issue of the *Fatwa*.

I turn first to sections 2 to 5 of the 1971 Act — "the code". In order to fall within the provisions of section 2, this must have been a *divorce or legal separation* which has been *obtained by means of judicial or other proceedings* in the foreign country and effective under the law of that country. The mere cessation of the marriage was not, in my judgment, within the true meaning of the words "a divorce or legal separation". Although not the same as nullity, it is probably more akin to this notion in our law. If I am wrong in so thinking, then the conversion and the *Fatwa* must each be considered. It was not submitted that the conversion can fall within the words "judicial or other proceedings", and that must indeed be correct. I also have the gravest doubts whether the *Fatwa* falls within those words, but in any event the *Fatwa* "obtained" nothing. It had no effect upon the cessation, which was already complete without any outside intervention. Therefore, in my judgment, neither the act of conversion nor the *Fatwa* fall within 'the code'.

In considering the provisions of section 6 of the 1971 Act, Mr. Stevens, for the husband, sought only to rely upon the *Fatwa*, and submitted that it would be recognised under the laws of the domicile of both husband and wife. I have already expressed my view that it did not "obtain" anything, but in any event there is another reason why, in my judgment, section 6 does not apply.

The relevant date for section 6(3) and 6(4) was the date of institution of proceedings, which was at the earliest February 27, 1978, when the *Fatwa* was sought. I hold that by this date the domicile of the wife had reverted to her domicile of origin in Sri Lanka, and by common consent of the two expert witnesses, neither the conversion nor the *Fatwa* would have affected this marriage under the laws of Sri Lanka. If I am not entitled to drew that conclusion because I have not received any evidence from experts in the law of Sri Lanka, then I would be bound to assume that the law of Sri Lanka is the same as English law. This is the very issue to be decided and, that being so, I would refuse recognition. Reference to this problem is made by the learned editor of Cheshire's Private International Law, 9th Edition at page 377, where the following passage is found:

"There is a difficulty where one spouse is domiciled in England and the other spouse is domiciled in the country where the divorce is obtained or in a country which recognises the divorce. The question whether section 6 is applicable poses the circular problem that the divorce will be recognised only if recognised in England, and that is the very problem at issue. That being so, recognition must be refused."

In my judgment, for each or any of the reasons which I have given above, this court is not bound under the provisions of the 1971 Act to recognise the happenings in Malaysia as having already put an end to this marriage.

A further argument was advanced for the husband upon the basis that the cessation of the marriage was more akin to our notion of nullity. It was then said that the proceedings now extant in Malaysia have only been delayed at the request of the English court and a declaration would soon be obtained in Malaysia. This declaration, it was submitted, should be recognised by an English court as a decree of nullity granted in the court of a foreign country in which one of the parties is domiciled. Reliance was placed on the provisions of section 5(3)(a) of the Domicile and Matrimonial Proceedings Act, 1973. I crave leave to doubt whether such a declaratory judgment is a decree of nullity, but if this submission were correct I would still have a residual discretion whether or not to recognise that decree or declaration.

Lest I should be held wrong in the views which I have already expressed, it will be convenient to consider this residual discretion together with section 8 of the 1971 Act. Lengthy argument was addressed to me on its effect. I hope I will not be thought disrespectful to those arguments if I deal with the matter quite shortly.

In my judgment, sections 8(2)(a)(i) and (ii) do not apply as the only possible proceeding was the *fatwa*, and no amount of notice or participation could have altered a situation already crystallised.

The wording of section 8 of the Act has followed the words of the Convention closely, and the word "manifestly" was no doubt inserted to discourage excessive reliance on the grounds of public policy in some countries in which foreign law might be applicable to domestic family problems but for its application. I believe that this word in section 8(2)(b) is redundant and mere surplusage. Within this jurisdiction, I do not believe that any judge would invoke the doctrine of public policy unless he felt that it was clearly right and just so to do.

The doctrine of public policy is a creature of the common law, and prior to the commencement of the 1971 Act (January 1, 1972), English courts have always reserved to themselves a residual discretion whether or not to recognise foreign decrees or orders. I have no doubt that the principles of the common law as they affect the residual discretion of English judges to refuse the recognition of foreign decrees or orders continue and is unaffected by the provisions of the 1971 Act.

This residual discretion has been defined or described in a number of different ways, and I have been referred to a large number of cases. I do not think it is helpful to an understanding of my reasoning for me to cite from a number of judgments. I am content to base my decision upon the principles enun-

ciated by the Court of Appeal (Lord Denning M.R., Donovan and Pearson, L.Js. in *Gray (Orse. Formosa)* v. *Formosa.*[2] I refer in particular to the judgment of Donovan L.J., as he then was, at page 271, where he says:

"If the courts here have, as I think they have, a residual discretion in these matters, they can be trusted to do whatever the justice of a particular case may require, if that is at all possible."

To those who say that such a wide discretion brings uncertainty into the law, I would reply that in many branches of the jurisdiction in the Family courts today there is an extremely wide discretion given to the judges.

Before finally exercising my residual discretion, I shall consider what the position would be if I were to grant a decree and make an order under section 23 or 24 of the Matrimonial Causes Act, 1973. In so doing, I must be guided by the principles set forth in section 25 of that Act. In case this judgment is read in Malaysia, I set out the relevant parts which read as follows:

"Section 25(1). It shall be the duty of the court in deciding whether to exercise its powers under section 23(1)(a), (b) or (c) or 24 above in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say —

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has, or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

The husband is married with a new young child. He already has three sons, the eldest of whom is nearing completion of his education. I have seen the financial figures set out in his Affidavit of Means, but I do not think that I have the whole picture. In particular, he has not dealt with the receipt of about £94,000 from the sale of the matrimonial home and the purposes for which it was used and how it was used, nor has he made any allowance for the increase in the value of the clinic which has been put into the accounts at cost. During the latter part of the hearing it became apparent that there had at one time been some insurance policies written in the wife's name and payable on the husband's death. There was no evidence whether these were extant. I will assume that they are not. In any event, I could not ensure that the premiums would be maintained in the future.

He has tax liabilities, and arrangements have been made to pay these by instalments. I see no reason why he will be unable to make these repayments out of income.

The clinic was purchased in the late 1960's for M$56,352.50. I note that in connection with a loan to the Bank Bumiputra Malaysia Berhad in June 1978, there was a requirement that it be insured against fire risk in the sum of not less than M$200,000. Presumably this took no account of the site value, although it might have taken into account the possible damage to neighbouring property as the clinic is situated in a terrace. Between 1971 and 1976 the value of the matrimonial home in Kuala Lumpur increased from M$160,000 to M$400,000. The clinic stands in a central position and there is no reason to think that its value has not increased substantially. Looking, therefore, at his statement of assets and liabilities as at October 31, 1978, as exhibited to his affidavit of January 26, 1979, I place the value on the clinic building at not less than M$200,000, and I reduce the tax liability, part of which has been repaid, to M$82,000. His present net assets, in my view, are certainly not less than M$200,000 (about £50,000). I have omitted from my calculation the absence of detailed explanation for the £94,000, and also the proceeds of sale in London.

What, then, is the wife's present position? She is living with her sister in London, to whom she owes £1,050. She is due to leave the United Kingdom within a few days or weeks. She will probably return to Sri Lanka where her mother lives. She needs money to continue to pay for Ajit's education, if she can possibly manage it. Unless she is awarded a lump sum she will be penniless and will have lost a position of considerable affluence. Wherever she settles, she will need some capital to provide herself with a home and the children with a base. She will also need to equip that home. Thereafter, she will have to exist. She may have to find employment, although she is not really trained for any particular one. The position in Sri Lanka has changed over recent years, so that she is unlikely to be able to return to teaching. She is unlikely to re-marry. I accept from her that she is really unable to assess her needs were she to make her home in Sri Lanka, but she will have difficulty in meeting the family standard of living. All her family friends in Sri Lanka are people of substance.

This is clearly a case where the financial solution should be sought in a capital sum to include future periodical payments, rather than a lump sum plus an order for periodical payments.

The husband has made an offer to his wife of the payment of £13,000 to cover all his obligations, including costs. To limit my award to that sum would not in all the circumstances be justice as between these parties.

If I were not to make a decree and were to leave this wife to her remedies in Malaysia, she would, I understand, recover something for the sum paid by her father at the start of the marriage. Allowing for sums spent on the wife alone and taking some small

factor for inflation, I do not think that this wife would recover more than £5,000 in the Malaysian courts.

Thus, turning to the exercise of my residual discretion and basing myself on the words of Donovan L.J. in *Gray (orse, Formosa)* v. *Formosa, supra,* I have reached the decision that justice in the present case requires me to grant a decree of divorce on the grounds of the husband's unreasonable behaviour, and to make an award of a lump sum to this wife.

I have taken into account all the circumstances of the case, but in particular the following:

(i) I am satisfied that in this case there has been no question of "forum shopping" — a practice which in my view is to be discouraged.

(ii) There was no question in the present case of illegal or fraudulent entry into the United Kingdom.

(iii) When the parties married it was intended that this marriage should be monogamous, and by the law of Ceylon it was, and by the law of Sri Lanka it is still so.

(iv) The wife moved to England at the instigation of her husband and in order to carry out her functions as a mother.

(v) The husband sold the matrimonial home in Kuala Lumpur without reference to his wife.

(vi) Thereafter, the only matrimonial home was in London.

(vii) This matrimonial home has been sold at the instigation of the husband.

(viii) The only asset on which the wife can claim any interest is the proceeds of sale in England, and I repeat she did not come to England in search of it.

(ix) She was given no notice of the husband's intention to convert to Islam. If she had been given such notice she had three months within which she could have started proceedings in this country.

(x) By his conversion to Islam, the husband has produced an effect which is quite outside the religion of his wife and outside her understanding, and anything which could implied have been agreed between them at the time of their marriage. This situation is to be contrasted with that where both parties were Muslims at the date of marriage.

(xi) The language of the family has always been English, and most of its members have undergone education in England for substantial periods.

The sum now standing in the joint names of the solicitors for the parties, including interest, is £28,000. I had considered in argument whether some part of this should be placed in trust for Ajit during his education, and thereafter to revert to the wife. I do not think in all the circumstances that the sum involved is sufficiently large to justify such a trust, nor indeed do I think it necessary to complicate my order, as I am satisfied that this wife will do whatever is right and proper for the completion of Ajit's education.

It follows from my reasoning above that I pronounce a decree nisi of divorce and award a lump sum to this wife of £28,000.

Lest any doubt exists, I wish to emphasise that by my decision I do not intend in any way to criticise the laws of Malaysia nor the precepts of the Islamic law or religion.

From the above judgment the husband appealed to the Court of Appeal.

COURT OF APPEAL.

J. Jackson Q.C. (*S.S. Stevens* with him) for the appellant.

J. Newey Q.C. (*G. Flather* with him) for the respondent.

Cur. Adv. Vult.

Roskill L.J.: I will ask Lord Justice Ormrod to give the judgment of the Court.

Ormrod L.J.: This is an appeal from a judgment of Wood J. given on March 14, 1979. At the conclusion of his judgment the learned judge granted a decree nisi of divorce to the petitioner, ("the wife"), and made an order for payment of a lump sum of £28,000, the value of the house at Edgeware, by the respondent ("the husband"), and rejected the prayer in the answer for a declaration that the marriage between the parties had been dissolved automatically by the law of Islam and the law of the Federal Territory of Malaysia upon the husband embracing the Muslim faith on August 13, 1976.

This case, therefore, is yet another example of the difficulties which arise when marriages are alleged to have been dissolved under a foreign law and one spouse is resident in this country and claims financial relief in respect of assets which are within the jurisdiction of this court. As the law stands the granting of a decree nisi is a condition precedent to the exercise by this court of its powers to make property adjustment and other financial orders under the Matrimonial Causes Act, 1973. Consequently, it is necessary to establish that the marriage is still in being in order that this court may make an order dissolving it. The result is a long, complex and extremely expensive enquiry, usually at the expense of the Legal Aid Fund, into foreign law in order to determine whether the marriage is or is not subsisting in form, that is, whether the dissolution under the foreign law is valid by that law and is to be recognised by this court. This elaborate exercise is necessary before a relatively simple decision can be made as to the disposition of the assets in this country between the spouses. These cases, which are apt to give rise to unfortunate conflicts between the jurisdiction of this court and the laws of other countries, are becoming increasingly frequent as a result of the extension of our recognition rules by the Recognition of Divorces and Legal Separations Act, 1971, and the relaxation of our own jurisdictional rules by the Divorce and Matrimonial Proceedings Act, 1973, which reduced the period of residence to one year.

In this case the husband and the wife are Tamils by race; both come from Sri Lanka families, though the husband was born in Malaysia. He was Hindu by religion, she was and is a Christian of the Anglican faith. He is a graduate in medicine of Bristol Uni-

versity, now practising in Kuala Lumpur and is aged 51. The wife, who is now 52, was living with her family in Sri Lanka when they met in 1954 while he was there on vacation. They married in Colombo on March 30, 1955 while he was still a student. The marriage was disapproved of by the husband's family and he became dependent on the financial support provided by the wife's family. She later also became a student at Bristol University but had to give up when the first child was on the way.

They had three children, born respectively in 1957, 1959 and 1962. In 1960, the family returned to Sri Lanka but there were difficulties, so, in 1961, they went to Malaysia. The husband has been in practice there ever since. From 1966 onwards he has been in private practice as an obstetrician and gynaecologist in the neighbourhood of Kuala Lumpur. The family home was established there. Both parties became citizens of Malaysia, but their relationship was very unhappy, so much so that the learned judge concluded, on her evidence, that the wife had an overwhelming case of unreasonable behaviour. (The husband was not present at the hearing of the suit owing to illness.)

In 1973, owing to the increasing difficulties of finding suitable education for the children in Malaysia, it was decided that they should complete their education in England. English is and was the language used in the family. So the wife and Nambi came to England after Christmas 1973. The wife returned briefly to Kuala Lumpur in 1974 but things were no better, and, in December 1974, the husband bought a house at 23 Rectory Gardens, Edgeware, for the wife and the children. In June 1975, the house was conveyed into the joint names of the husband and the wife, mainly to support an application by the wife to be allowed to remain in England. She returned to England in August 1975 and she and the three boys made their home there. The wife has been living in England since that time. Two of the boys have been taken away by their father but one, Ajit, is still with the wife in England and taking "A" levels this year with a view to going on to an English university in due course. The marriage then took a most surprising turn.

On August 13, 1976, the husband, without telling the wife, embraced the Muslim faith by a simple declaration before witnesses in Kuala Lumpur. This act on the part of the husband is said to have brought his marriage automatically to an end, according to the law in force in that area, namely, the Federal Territory of Malaysia. The wife remained in complete ignorance of this until the boys returned from a visit to their father in the following September and informed her that he had married another woman after becoming a Muslim. In the meanwhile, he had persuaded the wife to enter into a Deed of Gift with him of the house at Edgeware to his nephew. Since then the wife and Ajit have been living in London with her sister or with friends. On March 21, 1977, the wife began proceedings for an order setting aside the conveyance to the nephew on the ground of undue influence which are still pending.

On November 10, 1977, the wife filed a petition for divorce in this court, under section 1(2)(b), and in due course the husband filed his answer, alleging that the marriage had been automatically ended by his conversion to Islam.

Three questions arise on this answer. First, was the marriage brought to an end by the husband's conversion to Islam, according to the law of the Federal Territory? Second, if so, is this court bound to accept that the marriage has come to an end, or is there what has been called a "residual" discretion to decline recognition? Thirdly, if there is such a discretion should it be exercised in favour of the husband or the wife?

The learned judge accepted the evidence of Dr. Yaacob, an expert in Malaysian law called on behalf of the husband, that, by the relevant law, the marriage had come to an end automatically on the husband's conversion to Islam, and rejected the evidence of Dr. Pearl who gave evidence on behalf of the wife. However, he held on various grounds that the court could not recognise this change of status. He also indicated that, if he was wrong in so holding, he would have exercised his residual discretion to refuse to recognise the change in her status.

Malaysian Law

Dr. Yaacob maintained that in the Federal Territory the status of Malaysian citizens of the Muslim faith depends on Muslim religious law according to the rules of the Shafii sect. Under these rules a Muslim woman can only marry a Muslim man, but a Muslim man can marry a non-Muslim woman, provided she is what is known as a Kitabiyya. A Kitabiyya is a woman who is either a Jewess or a Christian. If a man who is married to a woman who is neither a Kitabiyya nor a Muslim afterwards becomes a Muslim the marriage is automatically terminated. So far, the Shafii rules are in line with the general law of Islam but, according to Dr. Yaacob, the Shafii sect adopts a very narrow and obscure interpretation of the meaning of Christianity. There was much argument on this point before the learned judge, but he eventually accepted Dr. Yaacob's evidence, that under the Shafii rules a member of the Anglican Church is not Kitabiyya, apparently because it is held that the Anglican Church was not in existence at the time of the birth of the prophet Mohammed. He supported his argument by reference to a document, called a *Fatwa*, which was issued by the Mufti, the Highest authority in Malaysia on such problems. A *Fatwa* seems to be something in the nature of a declaratory ruling given at the request of a party on a point of Muslim religious law which would be acted upon by the court in Malaysia. It will be necessary to comment on this *Fatwa* at a later stage in this judgment.

Having accepted Dr. Yaacob's evidence on these matters, the learned judge found as a fact that the marriage had automatically come to an end on the husband's conversion to Islam. For the purposes of this appeal we must accept this as proof of the relevant law.

Recognition

In order to defeat the wife's petition in this case the husband has to show that the change of status brought about by his conversion to Islam should be

recognised by the English Court. In consequence of the Recognition of Divorces and Legal Separations Act, 1971, our recognition rules are no longer the same in cases of divorce or legal separation on the one hand, and of nullity on the other. Under section 8(2) recognition of divorces to which the Act applies may be refused "if and only if" one of the three conditions set out in paragraphs (a) and (b) of the subsection is satisfied. Recognition of foreign decrees of nullity, on the other hand, is subject to the common law rule stated in *Salvesen or Von Lorang* v. *Administrator of Austrian Property,*[3] namely, that in the absence of fraud or collusion the decree of a competent court of the domicile must be recognised unless it offends against British notions of substantial justice.

In the present case we are concerned with a form of dissolution of marriage by operation of law which cannot be fitted into our concepts of either divorce or nullity. However, we take the general principle to be that in cases involving status this court will follow the law of the domicile where the parties have a common domicile, even though there has been no decree or judgment of the court of the domicile, subject to the same proviso that it must not offend against British ideas of substantial justice.

In this case the material date for determining the question of domicile, in our view, is the date of the husband's conversion to Islam, i.e. August 13, 1976, at which time the learned judge found and it is not disputed, that the wife retained her domicile of choice in Malaysia, or, more precisely, in the Federal Territory. She was still intending to return to Kuala Lumpur when the boys' education in England had been completed.

We conclude, therefore, on the learned judge's findings as to the effect of the relevant law on this marriage, namely, that on the husband's conversion it had ceased to exist, that this court ought to recognise the change of status, so effected, subject always to the proviso, which in this case is a very important reservation. It was contended on behalf of the husband that the change of status should be treated as a divorce and recognised under the provision of the 1971 Act. That Act provides for two modes of recognition. Sections 2-5 relate to divorces obtained by means of "judicial or other proceedings" in any country outside the British Isles. Assuming that we are dealing with a divorce, these sections clearly do not apply to this case because there were no proceedings of any kind. Section 6, in its original form, preserved the common law recognition rules in respect of a divorce "obtained in the country of the spouses' domicile," but it has been amended by the Domicile and Matrimonial Proceedings Act, 1973, section 2(2), and in its amended form it appears to refer only to divorces obtained as a result of the institution of proceedings". (See section 6(4)).

An attempt was made on behalf of the husband to argue that the Fatwa was a proceeding within this section. The learned judge held, rightly in our view, that it was nothing more than a confirmation of the local law that the marriage had ceased to exist on the husband's conversion. It effected nothing of itself. In any event, as the judge found, the wife had ceased to be domiciled in the Federal Territory when the *Fatwa* was obtained and had resumed her domicile of origin in Sri Lanka where this form of "dissolution" of marriage is not recognised. Consequently, the husband could not satisfy the conditions set out in section 6(3).

We do not think that the 1971 Act has any application in this case because the way in which this marriage came to an end cannot properly be categorised as a divorce or legal separation within the meaning of the Act. Moreover, both sections 6 and 8 appear to contemplate some form of proceedings but here there were none. If the change of status is to be recognised in this country, it can only be upon the common law principles to which we have already referred.

The justice of the case

We now have to consider whether the change of status under the law of the Federal Territory accords with our idea of substantial justice to the wife. We regret to have to say that we think that, in the words of Sir Jocelyn Simon P. in *Lepre* v. *Lepre,*[4] at page 65: "it must be taken to offend intolerably against the concept of justice which prevails in our courts."

In reaching this conclusion we are entitled to consider the effect of the legal rules in force in the Federal Territory, as was done by this court in *Gray (orse, Formosa)* v. *Formosa*[2] and in *Lepre* v. *Lepre, supra.* The idea that a marriage of over twenty years' duration can be brought to an end by the conversion of the husband to another religion in itself offends our concept of justice. We bear in mind that both parties are Malaysian citizens and, therefore, subject to the law in force in that country, but they were married in Sri Lanka where the law is quite different. Moreover, the Muslim law in force in the Federal Territory adopts a peculiarly narrow definition of the term Kitabiyya which appears to depend upon an arbitrary and historically inaccurate distinction between particular denominations of the Christian religion.

We think also that in a number of ways the facts of this particular case demonstrate that a serious injustice would be done to the wife if this change in her status were to be recognised by this court. She was kept in complete ignorance of the husband's conversion for over a year so that she had no opportunity of seeking legal advice in Kuala Lumpur or of herself applying to the Mufti for a Fatwa, as she would have been entitled to do on the evidence of Dr. Yaacob. This would have provided an opportunity of making representations on the history of the Anglican Church which might have led the Mufti to take a different view of her position as a Kitabiyya. As the evidence stands the whole matter was dealt with on an *ex parte* basis. Furthermore, we do not regard the circumstances in which the Fatwa was obtained by the husband as satisfactory or in accordance with our sense of justice. Surprisingly, it was obtained by Dr. Yaacob himself, then acting as legal adviser to the husband, so that the learned judge did not have the advantage of hearing a truly independent expert on Muslim law in Malaysia. Moreover, the Fatwa itself appears to have been based upon an assertion, put forward in the first place by Dr. Yaacob, which

the wife has had no opportunity of challenging. The two relevant documents read as follows:—

"27th February 1978.

The Mufti of the Federal Territory,
Kuala Lumpur.

Sir,

We act for Dr. Umar Viswalingam bin Abdullah, formerly known as Dr. Uma Viswalingam.

Our Client, then a Hindu, underwent a civil marriage on 30th March, 1955, in Sri Lanka (Ceylon) with one Sarojini d/o Sevaprakasam an Anglican, i.e. a follower of a Christian denomination which came into existence after the birth of Prophet Mohammed.

Our Client's wife has been living in England since 1974 and has remained an Anglican.

We have been instructed to obtain a Fatwa in respect of the aforesaid marriage, particularly in regard to the fact that our Client's wife is still an Anglican.
Thank you.

Yours faithfully,
DR. YAACOB."

The reply to that letter:

"6th March 1978

Dr. Yaacob & Ismail,
4028B, 4th Floor,
President House (Regent Hotel),
Julan Sultan Ismail,
KUALA LUMPUR.

Sir,

Re: *Marriage of Dr. Umar Viswalingam bin Abdullah and Sarojini d/o Sevaprakasam.*

With reference to your letter dated 27th February 1978 in respect of the above, this is to inform you that pursuant to Muslim Law in force in the Federal Territory, the marriage in question no longer subsists since Dr. Umar has embraced Islam and his wife has not followed suit.

2. This ruling/Fatwa is made in accordance with the facts referred to in your letter aforesaid.

Yours faithfully,
Sgd.
(DATUK SHEIKH A. MOHSEIN B.H. SALLEH)
Mufti of the Federal Territory."

For these reasons we are not prepared to recognise that the wife in this case had ceased to be the wife of the husband at the date when she presented her petition to this court. This appeal must accordingly be dismissed.

Appeal dismissed with costs.

Solicitors: *Kingsford Dorman; Mylles & Co.*

MALAYSIAN REPORTS

SINGMA SAWMILL CO. SDN. BHD. v. ASIAN HOLDINGS (INDUSTRIALISED BUILDINGS) SDN. BHD.

[F.C. (Raja Azlan Shah Ag. C.J. (Malaya) Wan Suleiman & Salleh Abas F.JJ.) February 5 & 24 1979]

[Johore Bahru — Federal Court Civil Appeals Nos. 121 & 122 of 1978]

Landlord and Tenant — Distress for rent — Agricultural land let for industrial purposes — Illegal consideration — Whether machines fixtures and therefore not distrainable — Whether tenant estopped from denying landlord's title — Contracts Act, 1950, ss. 24, 66 & 116.

Contract — Illegal contract — Whether compensation payable for advantage obtained — Contracts Act, 1950, ss. 24 & 66.

Land Law — Fixtures — Whether machinery used in factory fixtures — Distress Ordinance, 1951.

In this case the appellants had obtained warrants of distress against the respondents for arrears of rent. The respondents applied to discharge the warrants on the grounds (a) that the use of the land was illegal and therefore the contract of tenancy was void or voidable; and (b) that the machines are fixtures and therefore cannot be distrained. The land was agricultural land and the applicants had been unsuccessful in their application to change the category of land use from agriculture to industry. The learned Judicial Commissioner allowed the respondent's applications. He held that the appellants were guilty of giving an illegal consideration to the said agreement and as such the contract was void under section 24 of the Contracts Act, 1950. He further held that the machines which were attached to the land by bolts and screws were fixtures. The appellants appealed.

Held: the tenancy agreement in this case was void and unenforceable. The appellants were aware of the illegality when they entered into the agreement and therefore section 66 of the Contracts Act, 1950, could not assist them.

Cases referred to:-

(1) *Goh Chong Hin* v. *Consolidated Malay Rubber Estate Ltd.* (1924) 5 F.M.S.L.R. 86.

(2) *Crossley Brothers Ltd.* v. *Lee* [1908] 1 K.B. 86.

(3) *Ban Seng* v. *Yap Pek Soo* [1967] 2 M.L.J. 156.

(4) *Fatimah* v. *Moideen Kutty* [1969] 1 M.L.J. 72.

(5) *Kuju Collieries* v. *Jharkhand Mines* A.I.R. 1974 S.C. 1892.

(6) *Scott* v. *Brown, Doering, McNab and Co.* [1892] 2 Q.B. 724, 728.

(7) *Gas Light & Coke Co.* v. *Turner* (1840) 133 E.R. 127.

(8) *Alexander* v. *Rayson* [1936] 1 K.B. 169.

(9) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] A.C. 294; [1962] M.L.J. 143.

(10) *Arumugam* v. *Somasundram* [1933-34] F.M.S.L.R. 322.

(11) *Moti Chand* v. *Ikram-Ullah* A.I.R. 1916 P.C. 59.

(12) *Edward Ramia Ltd.* v. *African Woods Ltd.* [1960] 1 W.L.R. 86.

(13) *La Banque Jacques-Cartier* v. *La Banqe Depargne De La Cite Et Du District De Montreal* (1887) 13 A.C. 111, 118.

HIGH COURT.

G.S. Nizar for the applicants.

E. Gunaratnam for the respondents.

Cur. Adv. Vult.

Anuar J.C.: This is an application by the respondents, Asian Holdings (Industrialised Buildings) Sdn. Bhd. by way of Notice of Motion for an Order that: —